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OGC Has Reviewed

13 September 1956

MEMORANDUM FOR: Mr. Houston

SUBJECT : Possible Courses of Action in the Case of [REDACTED]

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1. The following study is in answer to your request of 10 September concerning possible courses of action the Agency might take against [REDACTED] or in similar cases which might arise in the future.

2. The fact that no clear cut legal action is indicated suggests that the Espionage Laws might be amended to cover these situations. In fact, these laws seem particularly unsuited for dealing with the security affairs of this Agency in respect to this type of case, overseas enforcement, and the necessity of meeting strict evidentiary requirements.

I. Criminal Prosecution

A. Prosecution as an attempt under 18 USC § 793(d).

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The relevant part of this section as concerns Mr. [REDACTED] case reads as follows:

"Whoever, lawfully having possession of . . . information relating to the national defense, which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, . . . shall be fined not more than \$10,000 or imprisoned not more than 10 years or both."

The problem raised by the above section is what constitutes an attempt. It is well recognized that there are two elements which must be present in order to constitute an attempt to commit a crime. These are (1) an intent to commit the crime and (2) a direct ineffectual act done towards its commission. In this case it is assumed that the letter provides sufficient indication of the required intent. Therefore, the only remaining problem is whether [REDACTED] actions constitute acts which will qualify as the second element of an attempt.

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There are very few federal cases concerning the question of whether certain acts are attempts. One of the leading cases is U.S. v. Coplon,¹ which also deals with the espionage laws, and concerns an attempt to violate both sections 793(d) and 794.² In that case one of the issues was whether or not the defendant's actions preceding her arrest constituted an attempt to pass documents. She was found guilty of an attempt under section 794 and appealed the decision on this point among others. In agreeing that the action was an attempt, Judge Learned Hand refused the contention that the defendant was engaged in merely the preparation for committing the crime rather than an attempt. He distinguished the American law from British law which requires that the defendant must have done all in his power to commit the crime and is stopped only at the last minute. He specifically states that that is not the law here.

Therefore, the problem becomes one of degree in trying to draw the line between acts which constitute merely preparation and those which would constitute an attempt. Judge Hand quotes with approval a decision of Holmes when on the Massachusetts Court,³ in which he says: "Preparation is not an attempt. But some preparation may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a locus poenitentiae, in the need for a further exertion of the will to complete the crime."

It can be said from this and other American cases, most of which are State cases and not available here, that the acts constituting an attempt need not be the last proximate act before the crime was actually committed, but depending on the circumstances, will be somewhere in between the forming of the intent to commit the crime and the final act of commission.

When applied to the situation at hand, it can be reasoned that the first action of [redacted] after forming his intent to release the information was to telephone the editor of True magazine to find out whether he was interested in publishing his story. This could be called preparation. When the editor indicated his interest, [redacted] then wrote the letter which in effect constituted an offer to provide information. If this offer were accepted and a contract completed, the

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1. 185 F 2d 629 (1950)
2. U.S. v. Coplon 88 FS 910 (1949)
3. Commonwealth v. Peaslee, 177 Mass. 267, 272, 59 NE 55, 56

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performance of contract would constitute the actual crime of espionage. There was nothing further which [redacted] had to do before he performed the act which actually constituted the crime, i.e., communicating the information. Therefore, if the writing of the letter offering in detail to provide the information could be considered an offer, or even an invitation for an offer, it was one of the last acts that [redacted] need perform short of committing the crime. In this type of crime the only act which could conceivably be considered an attempt would be something of this nature prior to the actual communication.

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Notice the difference between this type of crime and those offenses which partake of a physical nature such as murder, larceny, etc. In those crimes there is usually a much longer and more involved sequence of preliminary acts. The Coplon case provides support for the contention that the arrest of [redacted] just as he is beginning to orally communicate the nature of his material to True, or as he is delivering his manuscript for an article, is not necessary to convict him of an attempt. But rather that a conviction could be obtained for conduct prior to these actions. As stated above, by the very nature of the crime of illegally communicating information, acts of attempt are limited in number and it would appear that the writing of this letter would certainly be considered one of them. This argument would lose some of its force if the illegal communication imagined, was the delivering of a completed article after weeks of haggling over the price and personal effort to compose some readable prose. (Judging by his letter to True magazine, this effort might drag on for months.)

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B. Conclusion.

From the foregoing discussion it is concluded that there is at least an even chance of obtaining a conviction for an attempt to violate section 793(d) of the Code. In any case, if the Agency were willing to take the risk of divulging some of the information during the trial, it would seem worth a try. If it were successful, it would establish an extremely useful precedent for future cases of this type.

If a prosecution were brought of this nature it would be unlikely that the Agency would have to release much more information than was present in the letter [redacted] wrote. The only thing the prosecution would have to prove which might call for additional evidence is that the information in the letter related to the "national defense". In light of

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Gorin v. U.S.⁴ and Totten v. U.S.⁵ information of the type described in the letter would, on its face, "relate to the national defense". If it were found the court would not accept this and required further details, the Agency could decide to discontinue the prosecution. Of course, this does not consider the possibility that [REDACTED] himself might do a lot of voluntary talking to newspapers, etc. However, the minute he did that there would be no question that there would be a violation of the espionage law itself.

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II. The Possibility of Obtaining an Injunction Prohibiting Breach of His Secrecy Agreement

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A. Introduction.

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Although in some respects seeking an injunction against the act threatened by [REDACTED] would be novel to a court, there should not be too much difficulty in bringing this case within the established principles of equity. There is a particularly close analogy between Agency secrecy agreements and similar agreements in the business world to protect trade secrets. Also, there is a Supreme Court case discussed below which is very close to the circumstances in this case.

B. General principles governing the issuance of injunctions

Generally speaking an injunction is an equitable remedy for which there are two requirements. First, there must be an irreparable injury for which there is no adequate remedy at law. In the case at hand there seems to be no difficulty in satisfying this requirement. Certainly monetary damages for a breach of contract would not be sufficient. In fact the only adequate remedy is to prohibit a threatened breach of contract, for once the breach occurs the damage is done and cannot be repaired or offset by any remedy.

The second requirement is that the irreparable injury will affect some right or interest that is within the power of a court of equity to protect. In the past equity has protected property rights, but not personal rights. More recently, additional rights are being included within the general conception of a property right.

The problem in this case is whether or not there is an underlying property right to be protected by the proposed injunction. There is good reason to believe that rights under a valid contract are in themselves property rights and thus an injunction can be used to enforce the contract. In fact there seems no question that this remedy is available to prevent a violation of an express negative covenant in the usual contract. In

4. 312 U.S. 19 (1940)
5. 92 U.S. 105 (1875)

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addition, however, to being a negative covenant in a contract, it also concerns secrets of the employer. Apparently courts consider trade secrets a right to be protected whether there is a contract to that effect or not. Thus, in so far as Agency secrets are analogous, they could be protected in the absence of a contract.

A contract does exist, however, and when these two factors are present together, there is a strong case in favor of the existence of a right which equity will protect. This is particularly true when protection of a right will be in the public interest and work little hardship on a private person.

C. Secrecy agreements and contracts to protect trade secrets.

The closest parallel to an Agency secrecy agreement are those contracts made in the business world to protect trade secrets. In this field there is no question that an express contract on the part of an employee not to reveal trade secrets can be enforced by injunction, and further, that even a suggestion or a threat to reveal the secrets will justify the issuance of an injunction. The place where the analogy breaks down is the nature of the harm which will result to the employer. In the business world the injury is one of increased competition and diminution of profits. Also, there is the other side of the coin, the unjust enrichment of the employee. Thus, when an equity court allows an injunction, it is prohibiting an act which will usually result in both harm to the employer's business and gain to the employee. In our case, however, usually the element of gain to the employee is not present, but merely injury to the employer. And, of course, the injury is not one of decreased profits through competition, but rather a handicap to the continued operations of the Agency. An analogy in the business world to this type of injury would be where an employee revealed secrets of an employer which reflected so badly on the employer's public reputation that he lost their patronage as a result. Although a case has not presented itself in this way, it appears that the courts are willing to enjoin a breach of contract which threatens to injure an employer regardless of whether the employee will benefit.

D. The Bliss Case

The case which is closest to our problem is that of E.W. Bliss Co. v. U.S.⁶ In this case the Navy Department sought an injunction against the Bliss Co. which was a prime contractor for torpedoes. The Navy and the Bliss Co. were

6. 248 U.S. 37 (1918)

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working together to develop a new torpedo. Their relationship was governed by a series of contracts, each of which had a secrecy agreement. Section 19 of the first contract, signed in 1905, required that the Bliss Co. not make any use of the designs and devices furnished by the Navy for the torpedoes, nor exhibit any device or give any information regarding the torpedoes to anybody without the permission of the Navy. In 1912 there was an additional contract signed which included an identical clause and in addition the following new matter.

"They (the designs, devices and specifications) contain information of a confidential character that cannot be made public without detriment to the Government's and the contractor's interest, and they are to be treated as confidential by the parties of this contract"

Some time in 1913 the Company decided that it wished to negotiate with foreign manufacturers for production of torpedoes abroad. They communicated this intention to the Secretary of Navy, saying that they planned to release all designs and information in their possession concerning the newly developed torpedo. The Navy then brought suit to enjoin them from releasing this information.

The Government relied on two arguments at the trial.⁷ The first was that there was a threatened breach of contract, specifically the clauses outlined above and second, it contended that by virtue of the National Defense Act of 1911, which was similar to the espionage statutes today, the defendant should be restricted from disclosing such classified information. The District Court granted the injunction on the grounds of the contract argument but dismissed the argument concerning the National Defense Act saying that it was a criminal statute and that a court of equity ordinarily had no jurisdiction to enjoin the commission of a crime. The case was appealed to the Circuit Court and with some modifications affirmed, and then to the Supreme Court which also affirmed the injunction. The main issue at this point, and the cause of the modifications, concerned the question of what particular developments and designs, were furnished by the Navy and thus encompassed by the contract. The Supreme Court decision written by Justice McKenna with Chief Justice White dissenting, reveals several assumptions which are very helpful to our case. First of all, nobody seems to question the fact that the Government has a proper and enforceable interest in protecting secrecy in the interest of the national defense. There is no argument made that there is no property right involved here, although admittedly when dealing

7. U. S. v. E. W. Bliss Co., 224 F. 325 (1915)

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with a contract of this nature, the underlying tangible property rights in a torpedo design are much clearer than those in intelligence secrets. The following quotation certainly indicated that the Supreme Court felt the Government was entitled to security for its own sake as being in the national interest.

"Their secrecy was an especial object, as far as it could be maintained and for such length of time as it could be maintained."⁸

It then quotes with approval from the Circuit Court's decision.

"It is difficult to imagine a nation giving to one of its citizens contracts to manufacture implements necessary to the national defense and permitting that citizen to disclose the construction of such implement or sell it to another nation."⁹

X This decision in conjunction with the Totten case, which certainly indicates that the Government has a vital interest in maintaining national defense secrets, lends support to the argument that a valid contract with an employee not to reveal information which he has gathered during his employment would be enforceable by injunction. Of course, again the analogy is not quite perfect for the Navy was dealing with a private contractor under a construction contract which limited the use of information of a patentable nature. It is exactly this type of information which is so often an issue in private trade secrets cases. And it can be distinguished in kind from general intelligence secrets. A court might be tempted to decide that the proper way to enforce the restriction of intelligence secrets is through the espionage acts and not under a secrecy agreement.

E. Evidentiary requirements.

In considering whether a court test of the above arguments is feasible, it should be noted that there are certain principles within the trade secrets field which operate to our advantage. Particularly, it is fairly well settled that the plaintiff in such a suit does not have to present evidence in such a way that he reveals the very secrets he is trying to protect. Thus, in so far as the secrets themselves are important to the plaintiff's case, for instance, in showing that there are genuine secrets which are not known to the general public, the courts have examined them in camera.¹⁰ In the Taylor¹¹ case the court

8. 248 U.S. 37 at 45

9. Ibid.

10. Stone v. Goss, 65 N.J. Eq. 756, 55 A. 636 (1903); Taylor Iron and Steel Co. v. Nichols, 73 N.J. Eq. 684, 69 A. 186 (1908)

11. Id.

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impounded and sealed the reporter's notes so they would not be made public.

Added support for this general principle comes from the Supreme Court case of Dunsmuir v. Maryland.¹² This case allowed the plaintiffs an injunction to prohibit the defendant from discussing the secrets at issue with expert witnesses ~~whom~~ he had considered calling in his behalf in an original suit for injunction to protect the same secrets.

F. Conclusion.

The above discussion indicates that with the proper circumstances there is a good chance that a court will issue an injunction upon the basis of a secrecy agreement to prohibit the threatened release of information as in the [redacted] case. There are, of course, many arguments against such a decision which perhaps, because the matter is one of first impression the court would adopt. However, even if we lost the case the results might not be too bad. For one thing, unless it received an extraordinary amount of publicity, it should not vitiate the present restraining effects of the secrecy agreements on our personnel. And, secondly, it would provide an ideal argument for amending the espionage laws, not only to take care of this situation, but also at the same time to cover numerous other loopholes of which we are aware.

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cc: [redacted]
[redacted] Counsel, NSA

Subject - [redacted]
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12. 244 U.S. 100 (1917)

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